Supreme Court, U.S.
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No. 06-360

In The Supreme Court of the United States

ANTHONY G. VASEK,

Petitioner,

v.

MT. SAN JACINTO COLLEGE DISTRICT, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal Fourth Appellate District, Division Two

RESPONSE OF DISTRICT RESPONDENTS TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This case does not present a decision by a State court that is an important question of federal law that should be decided or settled by this Court. The State court did not decide an important federal question in a way that conflicts with relevant decisions of this Court. *See* Supreme Court Rule 10. Instead, this case involves a Petitioner who, after being afforded several opportunities to perfect his 42 U.S.C. §1983 claim in State court, failed to follow State procedural rules and court orders, resulting in the dismissal of his action.

On October 4, 2001, the California Court of Appeal affirmed the dismissal of Mt. San Jacinto Community College District ("District") and the District Officials in their official capacities. The Appellate Court remanded the action to the trial court on a limited scope wherein Petitioner was given the opportunity to state a Section 1983 cause of action against the District Officials ("District Officials") in their individual capacities and other named defendants. However, Petitioner did not seek leave to amend his complaint after the statutory time limit within which to amend had elapsed, and failed to seek leave to pursue additional claims. Instead, contrary to the court orders that were before him, Petitioner filed an Eighth Amended Complaint which included allegations inconsistent with the Opinion of the Appellate Court, and added an entirely new cause of action which had not been previously alleged by Petitioner. Contrary to the Appellate Court's Opinion affirming dismissal of the District, Petitioner again named the District as a defendant along with the District Officials in their individual capacities (collectively, "District Respondents"). Petitioner appealed after he defeated his own claims through his failure to follow

court orders and procedures which resulted in dismissal of his case. He now petitions this Court for review, which includes the same basis as his previous petition that was denied by this Court in June 2002.

Petitioner was hired by the District in 1987 and was initially assigned to teach engineering/drafting courses. After some years of conflict between Petitioner and the District regarding curriculum and Petitioner's qualifications, Petitioner was reassigned by the District to teach mathematics. The chief areas of conflict involved whether the vocational drafting program was a transfer program for engineering and whether Petitioner was qualified to teach vocational drafting. In August 1994, Petitioner filed his original complaint against the District Respondents and several District related defendants alleging several causes of action. Thereafter, Petitioner filed several lengthy amended complaints which were met with demurrers and sustained by the trial court. District Respondents demurred to Petitioner's Seventh Amended Complaint, which was sustained without leave to amend.

In March 1997, Petitioner filed three separate appeals from the trial court's judgments in favor of the various defendants. The appeals were consolidated and the Appellate Court issued its Opinion on October 4, 2001, affirming the judgments in part and reversing in part. The Appellate Court held, "In sum, we conclude that District and District Officials acting within their official capacity are not "persons" for purposes of Section 1983 claims. District officials acting in their personal capacities, on the other hand, are "persons" subject to suit under section 1983. The trial court properly sustained the demurrer only as to District and District officials in their official capacities." The Appellate Court ruled that Petitioner could amend his

complaint to allege a cause of action under 42 U.S.C. §1983 for retaliation against the District Officials in their personal capacities. The dismissal of the District was affirmed on the grounds that the District is not a person subject to suit under section 1983. By extension, the District Officials in their official capacities could not be sued. (Pet. App. at 47-49)

On January 23, 2002, remittitur was issued from the Appellate Court remanding this case to the trial court. On or about January 25, 2002, Petitioner filed a motion to recall remittitur.

Despite the Appellate Court's directions that Petitioner may be able to amend his complaint to allege a viable Section 1983 claim based on retaliation, Petitioner did not thereafter file an amended complaint within 30 days of the January 23, 2002 remittitur, the statutorily permitted time pursuant to *California Code of Civil Procedure* §472(b). Even after the trial court advised Petitioner that he would need to file a motion for leave to file an amended complaint, Petitioner filed no such motion.

On April 20, 2002, Petitioner filed a renewed motion to recall remittitur with the California Court of Appeal. On May 1, 2002, the California Appellate Court denied Petitioner's renewed motion to recall remittitur. Petitioner sought review by the California Supreme Court, and after that was denied, he petitioned this Court for review. On June 3, 2002, Petitioner's Petition for Writ of Certiorari was denied. (Docket No. 01-1476) The petition was based on a request for review of the Eleventh Amendment immunity, which is the same request included as part of the instant petition.

Petitioner filed a Motion for Continuance and a Request for Admissions wherein he requested that the matters in this action be continued until he could determine the status of individuals which Petitioner described as "disenfranchised defendants."

On June 17, 2002, the Court granted the motion of defendants Karen Sue Grosz ("Grosz") and Phil Hartley ("Hartley") for judgment on the pleadings, and granted Petitioner leave to file an eighth amended complaint "limited solely to addressing the pleading defect placed at issue by Grosz and Hartley's motion for judgment on the pleadings."

On July 17, 2002, Petitioner filed his Eighth Amended Complaint ("EAC"), completely disregarding the Appellate Court's order, as he brought back the District as a defendant and included numerous new and unauthorized allegations against the District and District Officials. The EAC alleged two causes of action: (1) "Deprivation, Under Color of Law, of Rights, Privileges, or Immunities Secured by the Constitution and Laws;" and (2) an entirely new cause of action, "Malicious Prosecution of Administrative Proceeding."

On July 25, 2002, the Appellate Court issued an order again denying Petitioner's Motion for Recall of the Remittitur and stating that District Officials were represented by Dennis J. Walsh and subject to the Appellate Court decision.

On August 16, 2002, District Respondents demurred to the EAC and each cause of action therein and filed a motion to strike portions of the EAC. The District Respondents' demurrer and motion to strike papers clearly

identified the District Official defendants as being represented by counsel.

On August 20, 2002, Petitioner filed a motion to strike defendants' pleadings and to vacate all court orders based on his insistence that there existed "disenfranchised" defendants. District Respondents' opposition to said motion again informed Petitioner that the District Officials were represented by counsel.

On November 27, 2002, the trial court sustained the District Respondents' demurrer as to Petitioner's first cause of action and granted District Respondents' Motion to Strike Portions of the EAC. The trial court granted Petitioner leave to file an amended complaint, but he chose to stand on his EAC and filed a waiver of leave to amend. As the time within which to amend had elapsed, pursuant to *California Code of Civil Procedure* §§581(f)(2) and 581(f)(4), the trial court dismissed District Respondents with prejudice.

Petitioner appealed from the order of dismissal. The Appellate Court affirmed the judgment in favor of Respondents. The Appellate Court found that Petitioner "defeated his own claims by procedural error." (Resp. App. at 3) The Appellate Court stated that Petitioner reached a procedural terminus by failing to amend his complaint after issuance of the remittitur from the previous appeal, filing an amended complaint without leave of court except as to Grosz and Hartley, and refusing to amend his ultimate pleading after being granted leave to amend. (Resp. App. at 3-4)

REASONS FOR DENYING THE WRIT

I. THE PROCEDURAL BACKGROUND OF THIS CASE REVEALS THAT NO REVIEW IS MERITED.

Petitioner's "questions presented for review" are misleading as to the proceedings of the trial court and Appellate Court. First, Petitioner claims that the full content of the initial Appellate Court's decision was communicated to him months after he was required to file trial court papers under deadline. However, Petitioner was in possession of the complete Opinion during that time. Although the Appellate Court acknowledged there was an insignificant typographical error in the labeling of certain subsections of the Opinion, it stated that the Opinion was complete as filed. (Pet. App. at 169)

Secondly, Petitioner asserts that he was prohibited from including the reinstated defendants in his next amended complaint. No such prohibition occurred. Petitioner was advised that he would need to file a motion for leave to amend his complaint, except as to Grosz and Hartley. The trial court merely sustained the demurrer and granted the motion to strike portions of Petitioner's EAC as plead, but gave leave to amend because the EAC did not conform to the rulings of the trial court and the Appellate Court.

Thirdly, Petitioner presents a question regarding Eleventh Amendment immunity which is identical to the question that was presented to this Court in his previous Petition for Writ of Certiorari, which was denied by this

Court on June 3, 2002. (Docket No. 01-1476)[1] The current petition stems from Petitioner's refusal to adhere to the 2001 State Court of Appeal's order affirming dismissal of the District, as Petitioner thereafter amended his complaint to again include the District as a defendant in his Section 1983 claim. In its 2001 Opinion, the California State Court of Appeal specifically held that the District and the District Officials in their official capacities were not "persons" subject to suit under 42 U.S.C. § 1983, and affirmed dismissal of the District and the District officials in their official capacities. (Pet. App. at 48-49) Petitioner now requests this Court to overrule its previous decision to deny certiorari on this same issue. Petitioner has provided no basis upon which he can do this. Under these circumstances, Petitioner should not be allowed to resurrect an issue in his previous petition after it was denied by this Court.

Petitioner has deliberately ignored this Court's previous denial of petition for review, and deliberately ignored the 2001 State court's decision that the District is not a viable defendant to his suit. If review were granted at this juncture, such consideration would create dangerous precedent, encouraging litigants to ignore the decisions of the courts, continue to file actions and reinsert claims previously dismissed, and thereafter petition this Court time and time again, hoping to achieve different results.

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[1] To the extent Petitioner bases his Petition for Writ of Certiorari on the same issues and grounds asserted in his previous 2002 petition, District Respondents object to this current petition on the grounds that this Court lacks Jurisdiction pursuant to Supreme Court Rule 13.1 and 13.2, as more than 90 days have elapsed from the denial of petition for review by the California Supreme Court on January 23, 2002 as to appeals E017343, E020125, and E019009.

II. THE PETITIONER'S PREDICAMENT IS A RESULT OF PETITIONER'S REFUSAL TO FOLLOW STATE COURT PROCEDURAL RULES AND ORDERS.

Petitioner argues that in his particular case, the State court's application of procedure regarding issuance of remittitur and document filing deadlines served to his detriment. This type of issue is not a subject for Supreme Court review.

Petitioner's reliance on *Felder v. Casey*, 487 U.S. 131 (1988) is misplaced because that case related to a notice-of-claim rule that targeted civil rights claims against the State. *See Johnson v. Frankell*, 520 U.S. 911, fn.9 (1997) (finding that a state appellate court rule did not discriminate against Section 1983 qualified immunity determinations and deemed the state procedure to be neutral). The circumstances and conditions for appeal are matters for each State to determine by itself. *McKane v. Durston,* 153 U.S. 684, 688 (1894).

In this case, the California state court procedural rules applied to Respondents as well as Petitioner and did not have an effect of treating Petitioner's claims, including his Section 1983 claim, unequally.

Petitioner's predicament was not due to any unequal treatment by the Appellate Court or trial court, but instead, has resulted from Petitioner's own deliberate refusal to follow the procedural state rules and orders of the court. Petitioner chose to ignore the rulings of the trial court and the Appellate Court, notwithstanding his failure to state a viable cause of action against the District and District Officials in their individual capacities.

Petitioner's characterization of events in the trial court proceedings are misleading. Contrary to Petitioner's representation (Pet., p.4), the trial court never ruled that the "missing defendants" had been dismissed from the case by the Appellate Court. The trial court merely informed Petitioner that the Petitioner's concern with purported "missing defendants" were not relevant to the discovery motions and motion for judgment on the pleadings which had been brought by other defendants in this action.

Contrary to Petitioner's representation (Pet., p.7), the trial court did not impose monetary sanctions on Petitioner on the basis that he included the "missing" defendants in his EAC. The monetary sanctions were related to Petitioner's continuing delay tactics and failure to follow court orders. To this day, Petitioner fails to acknowledge that he deliberately violated the Appellate Court's Opinion, affirming dismissal of the District, when he again named the District as a defendant in his EAC.

As the Appellate Court noted, Petitioner did not identify the purported missing defendants. (Resp. App. at 6) The Appellate Court, the trial court and Respondents understood that the District Officials who were subject to the original appeal were still in the case and represented by counsel. Petitioner refused to recognize this. Petitioner was advised of the District Officials who were represented by the Law Offices of Dennis J. Walsh on several occasions, including in the District Respondents' Demurrer and Motion to Strike Portions of his EAC. Nevertheless, Petitioner continued to dwell on purported "missing" defendants as a basis for not remedying his deficient EAC. The Appellate Court recognized that the individually

named defendants were represented by counsel. (Resp. App. at 6-7) As Petitioner was vague and incoherent in his assertions as to whom was "disenfranchised" or "missing," it appeared that the Petitioner was referring to additional missing defendants. (Resp. App. at 6-7)

The trial court granted the motion of Defendants Grosz and Hartley for judgm nt on the pleadings with leave for Petitioner to file an amended complaint, "*limited solely to addressing the pleading defect placed at issue by Grosz and Hartley's motion for judgment on the pleadings.*" The trial court further stated, "*If you wish to have leave to amend as to other portions of these proceedings, you must file a request to do that.*" Petitioner neither sought nor received leave to amend his complaint to add new substantive causes of action or to reinsert the District as a defendant.

Petitioner filed an EAC which contained allegations in total disregard of the Court's orders, as he brought back the District as a defendant and included numerous new and unauthorized allegations against the District and District Officials.

The Appellate Court's indication that Petitioner could amend his complaint did not relieve him from having to follow the State's pleading requirements. Petitioner's 38-page EAC consisted of 181 paragraphs and contained many broad allegations, along with conclusory allegations of conspiracy. Ultimate facts as opposed to conclusions are required in a complaint. "Conclusory allegations without facts to support them are ambiguous and may be disregarded." *Interior Systems, Inc. v. Del E. Webb Corp.* 121 Cal.App.3d 312, 316 (1981); *Ankeny v. Lockheed Missiles &*

Space Co. 88 Cal.App.3d 531, 537 (1979); *See McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996) (In finding that the lower court did not abuse its discretion in dismissing the action, the appellate court held that the lower court could require certain detail as may be appropriate in a particular case, and may dismiss the complaint if the order is violated.)

In the instant case, Petitioner did not follow the State's pleading requirements, the State's procedural rules, and court orders. Even after being given another opportunity to perfect his complaint, he instead chose to request dismissal of his case so that he could again appeal the trial court's rulings. Under the above-mentioned circumstances, this case is not the type subject to review by this Court.

III. THE STATE APPELLATE COURT OPINION IS IN CONFORMITY WITH EXISTING LAW.

Petitioner misconstrues the federal and state case law authority in an attempt to create an impression that a conflict exists between the law as set forth by this Court and California State courts. The Appellate Court's decision in *Kirchmann v. Lake Elsinore Unified School Dist.*, 83 Cal.App.4th 1098 (2000) is in accord with the line of federal cases addressing the question of whether a school district is an arm of the state. The Opinion of the Appellate Court in this case, which involves a community college, also comes within the legal framework of cases addressing similar issues. Petitioner simply brings no unsettled issue for review. Therefore, the Petition for Writ of Certiorari should be denied.

In view of California's extensive control over school districts' fiscal affairs and political status, school and college districts are instrumentalities of the state and exempt from suit under Section 1983. *See Kirchmann v. Lake Elsinore Unified School Dist.* 83 Cal.App.4th 1098, 1105 (2000), *cert. denied*, 533 U.S. 902 (2001). As this Court has previously denied certiorari on this point, there is no basis whatsoever to revisit the issue of whether the District is a proper defendant in a Section 1983 claim.

There is no conflict of law regarding Eleventh Amendment immunity afforded to California college districts. States have great latitude to establish the structure and jurisdiction of their own courts. In *Howlett by and through Howlett v. Rose*, 496 U.S. 356 (1990), this Court explained:

> The requirement that a state court of competent jurisdiction treat federal law as the law of the land *does not necessarily include within it a requirement that the [s]tate create a court competent to hear the case in which the federal claim is presented.* The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that *federal law takes the state courts as it finds them.*' [H. Hart, *The Relations Between State and Federal Law,* 54 Colum. L.Rev. 489, 508 (1954); citations.] The [s]tates thus have great latitude to establish the structure and jurisdiction of their own courts. (Emphases added.)

Howlett, 496 U.S. at 372.

Federal and California state law precedent reveal that no conflict exists as to determining whether Eleventh Amendment immunity is afforded to the District. "[T]he question of whether a particular state agency has the

same kind of independent status as a county or is instead an arm of the State, and therefore 'one of the United States' within the meaning of the Eleventh Amendment, is a question of federal law. But that federal question can be answered only after considering the provisions of state law that define the agency's character." *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429, fn.5 (1997). The court in *Kirchmann v. Lake Elsinore Unified School Dist.* 83 Cal.App.4th 1098, 1106 (2000) applied the same multi-factored balancing test that federal decisions have found to be relevant in determining whether a state entity should have Eleventh Amendment immunity. *See Belanger v. Madera Unified School Dist.*, 963 F.2d 248, 251 (9th Cir. 1992); *see also, Mt. Healthy City Board of Ed. v. Doyle,* 429 U.S. 274, 280 (1977). Thus, the courts, both federal and state, have applied the same analysis to make this determination. Therefore, the balancing test used by the courts is well settled and no conflict exists in this area of the law.

The federal courts also have extended Eleventh Amendment immunity from Section 1983 claims to California community college districts in *Mitchell v. Los Angeles Community College Dist.*, 861 F.2d 198, 201 (9th Cir. 1988), *cert. denied,* 490 U.S. 1081 (1989); *Cerrato v. San Francisco Community College Dist.*, 26 F.3d 968, 972 (9th Cir. 1994). While some other state courts have used the same balancing test for determining whether a school district is an arm of the State and have found that their government entity structures do not afford their school districts with Eleventh Amendment immunity, it does not automatically follow that California college districts are subject to such claims. The same analysis as applied by

Mitchell and *Kirchmann, supra,* to California schools and colleges has had a different outcome due, in part, to the unique circumstance of the educational system in California. This existing settled law, which involves application of the balancing test to the circumstances, allows for this type of result.

Petitioner inaccurately quotes *Missouri v. Jenkins* 495 U.S. 33, 56, fn.20 (1990), as the Court's statement that the Eleventh Amendment does not afford school boards immunity from suit was limited to those types of school boards like the one in *Missouri.* It was not made as an all encompassing edict as proffered by Petitioner.

In citing *Duke v. Grady Municipal Schools*, 127 F.3d 972, 981 (10th Cir. 1997), Petitioner misinterprets the case law, as the court in that case did not state that a clear and workable test was desperately needed in this area of the law.

Petitioner's reliance on *Doe v. Lawrence Livermore National Laboratory*, 65 F.3d 771 (9th Cir. 1995) also is misguided, as that case was overruled by this Court in *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425 (1997). In *Doe*, the Court found that the Eleventh Amendment protected the Regents of the University of California from the risk of liability even where the State could be indemnified by a third party. *Id.* at 905.

The petition further asserts that this case presents a question of important public policy deserving review by this Court. However, the facts of this case do not bear this out. Although Petitioner states that a state agency is barred from marshaling its resources and powers to forcibly impose beliefs upon unwilling recipients, Petitioner's lawsuit for money damages was based on something completely

different in that he alleged he was retaliated against for questioning whether the vocational drafting program was a transfer program for engineering. Contrary to Petitioner's assertion, Petitioner's suit does not involve any issues of promulgating false teachings. Petitioner is simply attempting to give greater import to his case where it does not exist. Moreover, Petitioner's argument does not overcome the District's Eleventh Amendment immunity.

In summary, the petition does not raise any issue on Eleventh Amendment immunity which deserves review by this Court. This Court previously denied certiorari on the same type of claims in *Kirchmann* and *Mitchell*. Petitioner provides no basis which merits a complete reversal of these denials.

CONCLUSION

Petitioner has not provided a compelling reason for review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

ANTHONY G. VASEK, Plaintiff and Appellant, v. MT. SAN JACINTO COLLEGE DISTRICT et al., Defendants and Respondents.	E033583/E035087 (Super.Ct.No. 254638) OPINION (Filed Mar. 10, 2006)

APPEAL from the Superior Court of Riverside County. Dallas Holmes and Charles D. Field, Judges. Affirmed.

Anthony G. Vasek, in pro. per., for Plaintiff and Appellant.

Bill Lockyer, Attorney General, Jacob A. Appelsmith, Senior Assistant Attorney General, Silvia M. Diaz, Lead Supervising Deputy Attorney General, and Dana T. Cartozian, Deputy Attorney General, for Defendants and Respondents Karen Sue Grosz and Phil Hartley.

Atkinson, Andelson, Loya, Ruud & Romo, Sherry G. Gordon and John W. Dietrich for Defendants and Respondents Atkinson, Andelson, Loya, Ruud & Romo, Ronald C. Ruud, Sherry G. Gordon and Steven Atkinson.

Briskin, Latzanich & Pene and Katherine B. Pene for Defendant and Respondent Keenan & Associates.

Shea Stokes & Carter, Maria C. Roberts and Shirley A. Gauvin for Defendant and Respondent Roy B. Mason.

Law Offices of Dennis J. Walsh, Dennis J. Walsh and George E. Ordonez for Defendants and Respondents Mt. San Jacinto Community College District et al.

Gilbert, Kelly, Crowley & Jennett, Barbara J. Mandell and Lyndon H. Hong for Defendant and Respondent Royce Lapp.

1. Introduction[1]

Anthony Vasek appeals from a judgment of dismissal entered after he declined to amend his eighth amended complaint and from a summary judgment entered in favor of defendant Royce Lapp. Vasek, a tenured instructor at Mt. San Jacinto Community College, seeks recovery for an alleged conspiracy against him beginning in April 1989

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[1] Vasek filed a request for judicial notice on December 20, 2004. Item A, located at pages one through 16 and 45 through 63 of the appendix to Vasek's request, and Item E appear to have been part of the trial court record below. We deem these documents part of the appellate record by augmentation. (Cal. Rules of Court, rule 12, subd.(a).) We deny the request for judicial notice of Item B, the bankruptcy pleadings, pages 17 through 44 of the appendix. (Evid. Code, § 452, subd. (d).) Item C is already part of the appellate record. Item D is this court's own records.

and continuing until 2004 and beyond. This case is now in its twelfth year of litigation.

Defendants and respondents are the Mt. San Jacinto College District and 26 individual defendants[2] (College District and District Defendants); the law firm of Atkinson, Andelson, Loya, Ruud & Romo, and its individual members, Ronald Ruud and Sherry Gordon (the Attorneys); Keenan & Associates; and four other individuals, Karen Sue Grosz, Phil Hartley, Roy B. Mason, and Lapp.[3]

In a previous opinion (E017343), this court addressed the viability of Vasek's claims. We reversed the trial court's order sustaining the demurrer of the District Defendants (including Mason), acting in their personal capacities; the trial court's order sustaining Attorneys' demurrer; the trial court's order sustaining Keenan's demurrer; the trial court's order granting summary judgment as to individual defendants, Grosz and Hartley; and the trial court's order granting Lapp's motion to strike under Code of Civil Procedure section 425.16.

Here Vasek has defeated his own claims through procedural error. By failing to amend his complaint after issuance of the remittitur from the previous appeal, by

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[2] Bobby Avila, Lawrence Barkley, David Bookin, Claire Broyles, Bernard J. Carrigan, William Farrell, Elgin Hushbeck, Eugene Kadow, Marcia Krull, Richard Lowe, Anne Motte, John Motte, Steve Narin, Kazi Nizamuddin, Shahla Razavi, Kelly Roberts, Robert G. Rockwell, Gwendolyn Schlange, Robert Schley, John Seed, Richard Sisk, Karl Sparks, Wayne Stuart, Michael Tuasig, Wally Upper, and M. Anne Walker.

[3] In our previous opinion, Mason and Lapp were included among the 28 District Defendants, although Lapp had separate representation. In the present appeal, Mason and Lapp appear separately as respondents from the other 26 District Defendants.

filing an amended complaint without leave of court except as to Grosz and Hartley, and by refusing to amend his ultimate pleading after being granted leave to amend, Vasek has finally reached a procedural terminus.

Vasek raises a multitude of issues that we will consider in turn according to the affected party. Our review is hampered by Vasek, acting in propria persona, failing to follow the rules and conventions of appellate procedure: "This court is not inclined to act as counsel for . . . any appellant and furnish a legal argument as to how the trial court's rulings . . . constituted an abuse of discretion." (*In re Marriage of Schroeder* (1987) 192 Cal.App.3d 1154, 1164; *Dills v. Redwoods Assocs. Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1.) We further deplore the rhetoric Vasek employs, relying upon ad hominem attacks and other unseemly rhetorical devices, rather than accurate citation to the record and reasoned legal argument.

2. Factual and Procedural Background

We have discussed the basic facts of this action in the earlier appellate opinion, which we incorporate by reference. Briefly, the College District employed Vasek as an engineering and mathematics instructor in 1987. After some years of conflict between Vasek and the College District about curriculum and Vasek's qualifications, in August 1993, the College District assigned Vasek to teach remedial mathematics. The chief areas of conflict involved whether the vocational drafting program was a transfer program for engineering and whether Vasek was qualified to teach vocational drafting. In August 1994, Vasek filed the original complaint. After various proceedings, Vasek filed his seventh amended complaint in August 1996. After

a final disposition, the trial court dismissed the case. Vasek appealed in March 1997.

In the meantime, a notice to correct deficiencies was issued to Vasek in November 1995 (Ed.Code, §§ 87732 and 87734) and a notice of intent to dismiss Vasek was issued in June 1996. An administrative hearing was conducted in 1997 and, in August 1997, the administrative law judge decided in favor of Vasek and dismissed the statement of charges and accusation against him.

After the previous appeal was decided in October 2001, the case was remanded to the trial court for further proceedings. Vasek did not file an amended complaint within 30 days, as required by Code of Civil Procedure section 472, subdivision (b), after issuance of the remittitur on January 23, 2002.

In June 2002, the court granted a motion for judgment on the pleadings brought by Grosz and Hartley but granted Vasek leave to file an eighth amended complaint (EAC), "limited solely to addressing the pleading defect placed at issue by Grosz and Hartley's Motion for Judgment on the Pleadings."

Instead, when Vasek filed the EAC in July 2002, he presented new allegations against defendants, including that he had prevailed in the 1997 administrative hearing. The EAC contains two causes of action: one for violation of civil rights (42 U.S.C. § 1983); and a new cause of action for malicious prosecution of administrative proceedings, asserted against 10 District Defendants – Broyles, Kadow, Mason, Motte, Roberts, Rockwell, Rohrabacher, Schlange, Stuart, and Upper – and against the Attorneys. The EAC alleges that August 26, 1993, the date Vasek was demoted, was the date of his injury.

The College District and the District Defendants, the Attorneys, Keenan, Grosz and Hartley, and Mason filed motions to strike and demurrers to the EAC.

In November 2002, the court ordered the demurrers sustained and motions to strike granted with leave to amend. Subsequently, Vasek filed a waiver of leave to amend in which he declined to file a ninth amended complaint.

After the latter defendants filed separate motions to dismiss, the court dismissed the action as to them. Vasek appealed in April 2003.

In December 2003, the trial court granted Lapp's motion for summary judgment. Vasek appealed in January 2004.

3. The "Disenfranchised" Defendants

As a preliminary matter, we address Vasek's persistent claim that some individual defendants, whom Vasek does not identify by name, were incorrectly omitted or dismissed by the trial court from the case. Vasek has not presented a coherent explanation of who are the missing parties, when they were dismissed or omitted from the case, and why this was wrong.

His reliance on this court's order of July 25, 2002 is misplaced. In that order, we explained that, based on our previous opinion, Vasek could proceed against the individual District Defendants acting in their individual capacities if he amended his complaint. Our previous opinion affected 28 District Defendants, including Lapp who was represented separately. (EO17343, p. 3.) The present appeal involves the same 28 District Defendants,

including Lapp and Mason, both now represented separately. The appellate order of July 25, 2002, did not identify or establish there are additional missing defendants who should be included in the lawsuit. Meanwhile, Vasek acknowledges that all the named defendants are proper respondents. Vasek has offered no legal authority to support his contention that he could not proceed with his lawsuit against the 35 named defendants, who are respondents in this appeal, absent other "disenfranchised" defendants. Therefore, we deem this issue lacking merit, unsupported, and waived on appeal. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.)

Our resolution of this issue also dispenses with Vasek's argument the trial court should have granted his motions to strike defendants' pleadings and to vacate court orders based on his contention there were other necessary defendants.

4. Grosz and Hartley

Vasek sued Grosz in her capacity as a member of the Board of Governors for California Community Colleges. Vasek sued Hartley in his capacity as President of the Academic Senate for California Community Colleges. Vasek's specific allegations against Grosz and Hartley are that, in March 1990, they helped cancel an independent investigation by the Academic Senate of Vasek's grievances. But Vasek also alleges they had left their positions before September 1992. Vasek's injury was sustained in August 1993. The other acts Vasek specifies in his appellant's brief all occurred after August 1993.

Grosz and Hartley filed a demurrer to the EAC on the grounds that the section 1983 claim, the cause of action directed against them, is time-barred because their only alleged involvement began in March 1990 and ended before September 1992, the beginning of the 1992-1993 academic year. So, a section 1983 claim filed in August 1994 based on an injury sustained in August 1993 was not timely under the then-applicable one-year statute of limitations. (*Knox v. Davis* (9th Cir.2001) 260 F.3d 1009, 1012-1013; *Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1028-1030; Code Civ. Proc., §§ 340, subd. (3), and 335.1) We agree that, even if Grosz and Hartley's alleged conduct had continued from March 1990 until September 1992, there are no allegations supporting a timely section 1983 claim in the EAC against these two people based on a complaint filed in August 1994 for an injury sustained in August 1993 but continuing until 1997 and after.

Vasek argues that our previous opinion permitted him to amend his complaint to allege a continuing course of conduct, including an administrative disciplinary proceeding beginning in November 1995 and ending in August 1997. But it is a complete misinterpretation for Vasek to assert we "left the door wide open for Vasek to allege any and all wrongful conduct . . . including factual allegations that occurred after filing the first set of appeals" in March 1997. We offered no such *carte blanche* to Vasek.

Instead, our former opinion suggested Vasek might have been able to amend his section 1983 claim to include allegations of equal protection violations. (E017343, p. 21) We also determined that he had successfully alleged the elements of a section 1983 claim against some defendants. (E017343, pp. 23-24.) But we concluded the College

District and the District Defendants, acting in their official capacity were immune from section 1983 liability, citing *Kirchmann v. Lake Elsinore Unified School District* (2000) 83 Cal .App.4th 1098. (E017343, pp. 24-27.) As to Keenan, even though we overruled the order sustaining the demurrer, we opined amendment was still necessary to state a valid claim. (E017343, p. 53.)

In our last opinion, we noted it was possible to allege a continuing conspiracy. The facts would need to demonstrate the existence of a conspiracy; i.e. that coconspirators have knowledge of and intent to accomplish a planned objective. (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582.) But Vasek had to allege facts, not conclusions, showing a "'series of related acts, one or more of which falls within the limitations period.'" (E017343, p. 43, citing *Green v. Los Angeles County Superintendent* (1989) 883 F.2d 1472, 1480, overruled in *National R.R. Passenger Corp. v. Morgan* (2002) 536 U.S. 101, 114; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 816.)[4] And, once an injury has occurred, "[m]ere continuance of a conspiracy beyond the date when injury or damage occurs does not extend the statute of limitations. [Citations.] To establish a continuing violation, continued unlawful acts must be demonstrated." (*Compton v. Ide* (9th. Cir.1984) 732 F.2d 1429, 1432-1433.)

Applying the foregoing principles to Grosz and Hartley, we conclude Vasek should have amended his complaint after issuance of the remittitur on appeal. When he finally

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[4] We recognize that the "related-acts" test in *Green* was overruled by *Morgan*. But we discuss it because Vasek relies upon it and it may have some continuing viability as to general principles.

did amend after receiving leave, he went both too far and not far enough. He added new conclusory allegations but he did not supply the factual predicate necessary to make Grosz and Hartley liable for a continuing conspiracy and certainly not liable for every adverse employment event that affected Vasek after September 1992 when these two people departed the scene.

When a case involves an order sustaining a demurrer with leave to amend and "'[w]hen a plaintiff elects not to amend the complaint, it is presumed that the complaint states as strong a case as is possible [citation]; and the judgment of dismissal must be affirmed if the unamended complaint is objectionable on any ground raised by the demurrer. [Citations.]' [Citation.]" (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 585.) Because Vasek declined to amend his complaint to make the necessary allegations, the trial court did not abuse its discretion when it dismissed the action as to Grosz and Hartley. (Code Civ. Proc., § 581, subds. (f)(2); *Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.)

The trial court also properly granted Grosz and Hartley's motion to tax Vasek's costs on appeal because the cost memorandum was belatedly filed on August 2, 2002.[5] In order to be timely, the cost memorandum should have been filed by March 4, 2002, which was 40 days after the clerk of the court issued its remittitur on January 23, 2002. (Cal. Rules of Court, rules 26(d), and 870(a)(1);

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[5] Motions to tax costs were also filed by Mason, the College District, the Attorneys, and Keenan. The same analysis applies regarding them and Lapp.

Hydratec, Inc. v. Sun Valley 260 Orchard & Vineyard Co. (1990) 223 Cal.App.3d 924, 929.)[6]

5. The Attorneys

The Attorneys were sued because they represented the College District in employment matters and gave advice regarding Vasek's employment. The Attorneys were named as defendants in the third amended complaint, the subject of Vasek's previous appeal, and in the EAC, filed after the trial court granted Grosz and Hartley's motion for judgment on the pleadings with leave to amend. At this juncture, the only issue is whether the trial court properly dismissed the EAC with prejudice after Vasek declined to amend.

For several reasons, we uphold the trial court's dismissal of the EAC. First, dismissal was not an abuse of discretion when Vasek declined to amend after the trial court sustained the Attorneys' demurrer and granted the motion to strike with leave to amend. (Code Civ. Proc., §§ 581, subds. (f)(2) and (4); *Leader v. Health Industries of America, Inc., supra,* 89 Cal.App.4th at p. 612.) The dismissal was also proper because both the demurrer and the motion to strike directed at the EAC were well taken. Vasek had not been given leave to file the EAC asserting more allegations and a new cause of action against the Attorneys. The EAC significantly exceeded in scope the trial court's grant of leave to amend Vasek's claims against Grosz and Hartley. Whatever merit may have existed in

[6] The District and District defendants withdraw their objection to the appealability of this issue in a letter filed July 21, 2005, with this court.

his previous versions of the complaint, because Vasek refused to cure the defects in his EAC, the court properly dismissed the action as to the Attorneys. (*Soliz v. Williams, supra,* 74 Cal.App.4th 577.)

6. Keenan

Keenan & Associates was the insurance broker and claims adjuster for the College District. Keenan sent notices to Vasek rejecting his claims against the District on March 10 and August 16, 1994. Vasek alleges that Keenan convinced "District officials to not grant Vasek's request for an inquiry into the reasons for his banishment and the cancellation of the planned investigation."

Keenan occupies the same procedural posture as the Attorneys in that Vasek had not been given leave by the trial court to file the EAC asserting new claims against Keenan. For that reason and because the EAC exceeds the scope of Vasek's previous claims against Keenan, the court properly dismissed the action as to Keenan. (*Soliz v. Williams, supra,* 74 Cal.App.4th 577.)

7. The District

In the previous appeal, based on *Kirchmann v. Lake Elsinore Unified School District, supra,* 83 Cal.App.4th 1098, we affirmed the judgment dismissing the College District itself and the District Defendants, when acting in their official capacity, (E017343, pp. 26 and 71) but proposed "[i]f . . . plaintiff is alleging the retaliatory deprivation of certain rights and privileges, *his complaint can be amended* to incorporate such allegations in his section 1983 claim. [Emphasis added.]" (E017343, pp. 21-22.) Therefore, Vasek's claims against the College District or

any of the District Defendants, acting officially, were terminated by the last appeal. All that remained was the potential to assert a claim against the District Defendants acting in their personal, rather than official, capacities.

As noted, however, Vasek did not file an amended complaint after the remittitur issued (Code Civ. Proc., § 472, subd. (b)). He also did not seek leave to file an amended complaint against the District Defendants. Nevertheless, in his unauthorized version of the EAC, he again named the College District itself as a defendant and added many new allegations and the new cause of action. Again, as discussed above, Vasek's failure to amend his complaint after the remittitur issued and his subsequent failure to seek leave to amend amply justified the trial court dismissing his case after he refused to file another amended complaint.

We also reject Vasek's urging us to revisit the applicability of *Kirchmann* and its holding that a school district is an instrumentality of the state, exempt from suit under section 1983. There is no cognizable reason to abandon our previous decision on this issue. (E017343, pp. 24-27.)

8. Mason

Mason was a College District employee. Vasek alleges that, after he filed his original complaint in 1994, Mason conspired with others to retaliate against Vasek in multiple ways, including by pursuing malicious prosecution of the administrative proceeding against him.

Again, Vasek had not been given leave to file the EAC asserting new claims or a new cause of action against Mason. For that reason and because the EAC exceeds the

scope of Vasek's previous claims against Mason, the court properly dismissed the action as to Mason. (*Soliz v. Williams, supra,* 74 Cal.App.4th 577.)

9. Lapp

Lapp based his motion for summary judgment on the one-year statute of limitations for a section 1983 claim. According to his supporting evidence, Lapp's one contact with Vasek occurred at a curriculum meeting on April 3, 1989. Lapp was a private consultant who supervised the meeting. After Vasek disrupted the meeting, Lapp wrote a report describing Vasek's conduct and in which he recommended eliminating the subject of drafting from the curriculum project. Lapp had no other contact with Vasek and no contact with the College District after June 1989. Lapp argues that, as a matter of law, this single incident cannot support Vasek's conspiracy claims first advanced against Lapp more than five years later in August 1994.

In opposition, Vasek did not offer any contrary evidence or any evidence demonstrating a continuing conspiracy between Lapp and the other defendants. Instead, he contends evidence of a conspiracy involving Lapp may be inferred from other facts or will be presented at trial.

Applying a de novo standard of review, we affirm the grant of summary judgment in favor of Lapp. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) Inferences cannot be made in a factual void. It is not enough, as Vasek does, to hint at evidence that is promised but never delivered. In opposing summary judgment, a party must supply "'specific facts showing that there is a genuine issue for trial.'" (*Hunter v. Pacific Mechanical Corp.* (1995) 37 Cal.App.4th 1282, 1286.) We

have reviewed the allegations of the complaint and Vasek's sparse submission in opposition to summary judgment and we find nothing to support Vasek's theory of conspiracy liability against Lapp.

We also disregard Vasek's first effort on appeal to assert a motion to tax Lapp's costs because Vasek never filed a motion to tax Lapp's costs in the trial court.

10. Sanctions

The trial court imposed sanctions of $1,400 on Vasek for filing the EAC in violation of the court's order allowing him to amend as to Grosz and Hartley only. Vasek has offered no credible argument and no authority as to why sanctions were an abuse of discretion under Code of Civil Procedure section 128.5: "Every trial court may order a party . . . to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous. . . . " We hold the trial court acted properly. Vasek's filing of the EAC was a blatant example of an action that was in bad faith, frivolous, or both.

11. Disposition

As Charles Dickens wrote in *Bleak House* about another interminable piece of litigation, it "still drags its dreary length before the Court, perennially hopeless." While at one point in these proceedings we recognized Vasek may have been able to present a legitimate claim for trial, subsequent actions by him have lost him the right to proceed. We affirm the judgment in favor of defendants and order them, as prevailing parties, to recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/ Gaut
J.

We concur:

s/Ramirez
P.J.

s/Hollenhorst
J.